

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1482

To be argued by
LOUIS R. ROSENTHAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1482

UNITED STATES OF AMERICA,

Appellee,

—against—

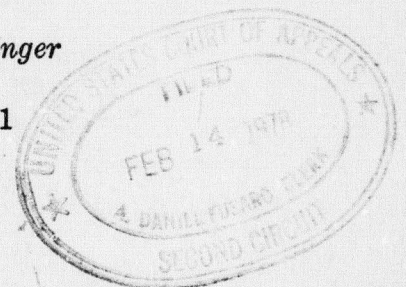
ROBERT LOEWINGER, et al.,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

LOUIS R. ROSENTHAL
Attorney for Appellant Loewinger
16 Court Street
Brooklyn, New York 11241
(212) 855-2600



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PRELIMINARY STATEMENT

This is an appeal from a decision of the United States District Court for the Southern District of New York, Judge Cannella rendered on October 6, 1977 denying appellant's motion to suppress evidence derived from an electronic surveillance order, and from the judgment of conviction of the United States District Court for the Southern District of New York, Judge Cannella entered on October 14, 1977, after appellant entered a plea of guilty to Count 2 of the indictment, a violation of Title 18, United States Code, Section 1955 and 2. On November 29, 1977, the appellant was sentenced to a term of imprisonment for a term of two years and fined the sum of \$20,000.00.

ISSUE PRESENTED

Whether the Trial Court's failure to grant appellant's motion to suppress evidence derived from the Electronic Surveillance Order and all evidence constituting the fruits thereof, was erroneous as a matter of law.

STATEMENT OF FACTS

Appellant was indicted for violating Title 18, United States Code, Section 1955 and 2, which involved various gambling offenses.

Much of the information which led to appellants indictment was gathered from electronic surveillance. The surveillance had been authorized by an order of Judge Griesa, on December 30, 1976 and an order of Judge Van Pelt Bryan, on March 9, 1977.

The surveillance order of December 30, 1976 was based on an affidavit submitted by Carl W. Amaditz, Special Agent, Federal Bureau of Investigation, which detailed the reason for the need of an electronic surveillance order.

Appellant made a motion to suppress all evidence derived from the electronic surveillance order and the Government submitted an affidavit in opposition.

On October 6, 1977, Judge Cannella denied appellant's motion in a memorandum decision, holding that the agents' affidavit established probable cause to believe that an "illegal gambling business" existed, and that the informants reliability was sufficiently established. The Court also held that the Government

established the particularized need to intercept wire communications.

On October 14, 1977, the appellant plead guilty to Court II of the indictment which was a violation of Title 18, United States Code, Section 1955 and 2. As part of the plea process, the appellant preserved his right to appeal the decision of Judge Cannella, which had denied his motion to suppress evidence derived from an electronic surveillance order.

On November 29, 1977 appellant was sentenced to a term of imprisonment for a term of two years and fined the sum of \$20,000.00

POINT I

THE GOVERNMENT FAILED TO COMPLY
WITH STATUTORY AND CONSTITUTIONAL
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AN ORDER TO INTERCEPT WIRE
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BEEN GRANTED.

Justice Holmes characterized wiretapping as a dirty business in Olmstead v. United States, 277 U.S. 438, 470 and the Supreme Court has disapproved of electronic surveillance because of its obvious invasion of the constitutionally guaranteed right to privacy and the general nature of the search and seizure involved. Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967).

To meet the Court's objections Congress attempted to establish explicit requirements with respect to electronic eavesdropping. These requirements deal with the obtaining orders for electronic surveillance, the execution of such orders; and the supervision of such orders and their execution on a continuing basis.

There are three statutory requirements which Chapter 119 of Title 18 mandates the government to comply with in order to obtain an order for electronic surveillance. They are:

- 1) particularized need for electronic surveil-

lance (Section 2518 (1)(c);

- 2) probable cause (Section 2518 (3)(a), (b) and (d); and
- 3) failure to comply with the statute or court orders made pursuant thereto.

The Supreme Court has required that the government strictly comply with the statutory requirements. In United States v. Giordano, 416 U.S. 505, 527 (1974) the Court specifically rejected the government's contention that substantial compliance was sufficient to avoid suppression.

Section 2518 (1)(c) demands that the government make:

"a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear unlikely to succeed if tried or to be too dangerous."

It is beyond question that the government must, to comply with the mandate of Section 2518 (1)(c), make a detailed factual showing Section 2518 (3)(c). In United States v. Kalustian, 529 F. 2d 585 (9th Cir. 1976) the Ninth Circuit reversed a gambling conviction because the application was conclusory as to the need for electronic surveillance. Although it detailed facts sufficient to establish probable cause,

"it did not adequately show why traditional investigative techniques were not sufficient in this particular case".

The Court rejected as conclusory allegations relating to the government's difficulties in investigating gambling cases generally. It also held that the alleged refusal of the informants to testify, was not conclusive. (opinion on rehearing). The Ninth Circuit based its holding upon the fact that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was designed to chart a course between protecting certain legitimate concerns of society and the great "threats to liberty... posed by the use of eavesdropping devices". The court further pointed out that the application.

"does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case." (emphasis added).

The Court was not persuaded that gambling cases generally cannot be cracked without electronic surveillance, observing that

"The Government's position is further undermined by the activity of other crime-fighting organizations (which, without even the right to use electronic surveillance, have)..... successfully prosecute(d) gambling crimes."

In the case at bar the government has not been able to meet its burden of showing a particularized need for electronic surveillance. In paragraphs 47 through 55 of his affidavit dated December 30, 1976 in support of the issuance of a wiretap order Special Agent

Amaditz gives the usual boiler plate reasons for his belief that no method other than wiretapping will lead to the cracking of the case.

The agent states that his alphabet of reliable informants (Mr. A, Mr. B, Mr. C, Mr. D and Mr. E) are unwilling to testify or have their identities disclosed for fear of retribution. The agent also states in paragraph 54 that an Assistant U.S. Attorney advised against the tactic of subpoenaing individuals involved or even granting immunity because "there is insufficient knowledge of the roles of various individuals the identities of their co-conspirators, and the scope of their overall knowledge of the operation, to make a decision at this time." Further, "Even if witnesses were granted immunity, sufficient facts are not available at this time to measure the truthfulness of the compelled testimony. (Emphasis added). So it appears that the Government had abandoned all conventional traditional and nonviolative means of investigation in order to gain a wiretap order and short circuit their investigation. It is ironic that the government that is screaming "probable cause" throughout its application had not sufficient facts to measure the truth of the compelled testimony.

Also, there is no proof or allegation that the informants were offered protection or that their fears are real.

Although the affidavit said that a prior attempt to infiltrate the defendant Loewinger's operation failed in 1973, it does detail why a new attempt, three years later to infiltrate Loewinger or one of the many others under investigation would fail. Nor do we get the facts and circumstances of the 1973 failure. As the Ninth Circuit concluded, in Kalustian, supra at p.589 in terms applicable to the instant application:

"In effect the government's position is that all gambling conspiracies are tough to crack, so the government need show only the probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support that view."

In United States v. Steinberg, 525 F. 2d 1126 (2d Cir., 1975) the court reluctantly upheld a wiretap warrant in a drug case in which the government relied in large measure on formula recitations. It did so, however, only after its own careful study of the entire application. It was greatly influenced by the fact

"that on oral argument appellants could advance no logical alternative to wire-tapping to ascertain the details of.... (appellant's) operation." Slip Op. p. 6438.

It is clear that Section 2518 (1)(c) requires a factual showing. Conclusory allegations will not suffice. For a judicial order to issue, the judge must determine

"on the basis of facts submitted by the applicant that

* * * * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous..." Section 2518 (3) (emphasis added).

Since the application for wiretap authorizations contained no adequate statement of justification , all evidence seized pursuant to the Order of December 30, 1976 must be suppressed.

The application must demonstrate that there is probable cause to believe that:

(1) a particular individual is committing or will commit one of the limited number of offenses for which electronic surveillance may be authorized;

(2) particular communications concerning said offense will be so obtained; and

(3) there is a nexus between the location or facilities to be eavesdropped upon, and the said offense or the said individual.

It is clear that each of the three above aspects of probable cause must be established. United States v. Kleve, 337 F. Supp. 557 (D. Minn. 1971), rev'd on other grounds with explicit approval of the district court's reasoning, 465 F. 2d 187, 190 (8th Cir. 1972). Kleve held that a failure to establish probable cause

for an essential element of the alleged offense was fatal.

The standard to determine the existence of probable cause is the same as that applicable for an arrest or a search warrant. Falcone v. United States, 505 F. 2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975). In Carroll v. United States, 267 U.S. 132 162 (1925), the Supreme Court held that probable cause requires information sufficiently trustworthy so that a person of reasonable caution would be justified in believing that a particular fact situation existed. For instance, in Dumbra v. United States, 268 U.S. 435, 440-441 (1925), the Supreme Court held that probable cause was established for belief that defendants possessed wine in violation of prohibition laws. The affidavit recited that the affiant witnessed an illegal sale of intoxicating liquor by defendant and that he made such a purchase from defendant himself.

Central to a finding of probable cause is a factual demonstration that a crime has been, or is about to be committed. In Nathanson v. United States, 290 U.S. 41, 47 (1933), the Supreme Court emphasized that to find probable cause, a judge or magistrate must be presented with concrete facts or circumstances. "(M)ere affirmance of belief or suspicion is not

enough." And an allegation that a person is a "known gambler" "is but a bald and unilluminating assertion of suspicion that is entitled to no weight...."

Spinelli v. United States, 393 U.S. 410, 414 (1969).

The affidavits and applications at bar rely heavily on information provided by unidentified confidential informants. Accordingly, an analysis of the role such hearsay may play in these documents is required.

The standards for the use of hearsay from an unidentified confidential informant were established by the Supreme Court in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969). The application must recite facts, which if made upon personal knowledge of the agent, would be sufficient to establish probable cause. Additionally, the application must establish that the informant is credible and that his information is reliable. Aguilar, supra, 378 U.S. at 114-115; Spinelli, supra, 393 U.S. at 416; United States v. Karathanos, 531 F. 2d 26 (2nd Cir. 1976).

In Karathanos, supra, an INS investigator avered that a search of the subject premises, a restaurant known as Steve's Pier I, had resulted in the apprehension of "at least eleven (specifically named) illegal aliens"

"during the past five years". He stated that "one Athanasios Athanasiou, an admitted illegal alien", after surrendering himself to INS and being advised of his rights, stated that he had been employed by the Restaurant for over eighteen months, living in the basement with eleven fellow employees in six foot square cubicles. He quoted the informant as stating that "at least six of the eleven...are known by him to be illegal aliens." The Second Circuit affirmed suppression re-stating the "well-settled" basic standard for decision".

"When an affidavit relies on an informant's time (sic.) to establish probable cause, the affidavit must first, set forth, some of the underlying circumstances' forming the basis of the informant's conclusion that there is illegal activity or evidence thereof on the premises and, second it must state facts which give some assurance that the informant is a credible person." (emphasis added).

Dealing with the failure to satisfy the first aspect of the test the court stated (id. at 1719-20):

"It is equally consistent to infer that Athanasiou (the informant) was simply passing along rumors about various employees which he had collected in the course of his employment...; rumors, however, are patently insufficient to provide a sufficient basis for probable cause. If, indeed, Athanasiou obtained his information by direct statement from the aliens rather than by rumor, the... (INS Investigator's affidavit) should have stated so. Its failure to do so is a fatal deficiency.

Much of the information in the affidavits, *infra*,

is the product of multiple hearsay. It is clear that double hearsay is permissible in an affidavit only when the reliability of the source and the middleman have both been established under the standards of Aguilar and Spinelli. United States v. Smith, supra, 462 F. 2d 456, 460 (8th Cir. 1972). In any event it is "not to be encouraged". United States v. Fiorella, 468 F. 2d 688, 691 (2d Cir. 1972).

In the case at bar, the agent, in his affidavit, of December 30, 1976 does not make out probable cause to believe that the subjects of the order were violating Title 18 USC Section 1955, and therefore the affidavit is entirely inadequate under Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969).

As a basis for establishing probable cause, the agent tests relies in large part on information from his alphabet of informants, Messrs. A through E. Although Messrs. A, B, D and E have provided information that has led to arrests and convictions for gambling, Mr. C's reliability (he apparently did not cause any arrests or convictions) rests on the fact that he knew the nickname of Sam Leventhal (Sam the Cop) and that Leventhal, appropriately, was a former police officer. He also knew what kind of car Leventhal drove and what social

club Leventhal visited. All this information, apparently quite confidential would have been known by any six year old in the town.

Other than the allegations that Mr. A knows Loewinger and Wertheimer and placed bets with Loewinger and Wertheimer over the phone, there is no other independent evidence to establish probable cause for a wiretap order. Instead of relying on innocent observations, it should not have been difficult for the agents to listen in on the informant's phone when the informant allegedly placed bets with Loewinger and Wertheimer. But no, we have instead the very suspicious observations of Loewinger actually entering his own place of legitimate business, a clothing store.

Wertheimer also acts suspiciously by entering Loewinger's place of business 9 times over the course of 180 days and never appearing to have brought anything.

Other suspicious activities of Loewinger include his entering the premises of Nob Hill Colony 1 time while Wertheimer was to have entered.

In addition much if not all of the information that attempts to link Loewinger and Wertheimer with any three others alleged to be connected with gambling is either double hearsay or stale or both with the lion's

share of the observations and much of the information dating back to the summer of 1976 and the months of September and October 1976.

Because there must be probable cause for all elements of an offense the affidavit fails to show probable cause for belief that these statutes had been, or was about to be violated. Purported probable cause is based only upon speculation and surmise.

Section 2518 (10) (a) requires suppression when:

- "(i) the communication was unlawfully intercepted;
- (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- (iii) the interception was not made in conformity with the order of authorization."

A communication is unlawfully intercepted where there has not been full compliance with the requirements of Chapter 119.

Clearly, the government's failure to show a particularized need for electronic surveillance, and the failure to make a probable cause showing that a crime has been, or is about to be committed has resulted in a electronic surveillance order being issued without the necessary compliance with the statutory requirements of Chapter 119, and therefore the motion to suppress such evidence should have been suppressed.

C O N C L U S I O N :

The appellant's motion to suppress the evidence attained pursuant to the wiretap orders should have been granted, and consequently appellant should be allowed to withdraw his guilty plea which was entered as a direct result of the unlawful denial of his suppression motion.

Respectfully submitted:

LOUIS R. ROSENTHAL
Attorney for LOEWINGER
16 Court Street
Brooklyn, New York 11241